APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,735

THE NAVAJO TRIBE, a Treaty Tribe of Indians, *et al.*, *Appellants*

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Appellees*

Appeal from the United States District Court for the District of Columbia

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Decided March 2, 1961

Mr. Joseph F. McPherson, with whom *Messrs. Norman M. Littell* and *Charles J. Alexander* were on the brief, for appellants.

Mr. Durane B. Beeson, Attorney, National Labor Relations Board, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Messrs. Stuart Rothman*, General Counsel, National Labor Relations Board, *Dominick L. Manoli*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Herman M. Levy*, Attorney, National Labor Relations Board, were on the brief, for appellee National Labor Relations Board. *Mr. Russell Specter*, Attorney, National Labor Relations Board, also entered an appearance for appellee National Labor Relations Board.

Mr. Joseph M. Stone, with whom *Mr. Robert J. Connerton* was on the brief, for appellee International Hod Car-

riers', Building and Common Laborers' Union of America, AFL-CIO.

Mr. David E. Feller, with whom *Mr. Jerry D. Anker*, was on the brief, for appellee United Steelworkers of America.

Messrs. J. Albert Woll, Robert C. Mayer, and *Theodore J. St. Antoine* were on the brief for appellee International Union of Operating Engineers, AFL-CIO.

Mr. Alfred A. Colby entered an appearance for appellee Texas-Zinc Minerals Corp.

Before MAGRUDER, Senior United States Circuit Judge for the First Circuit,* and PRETTYMAN and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge*: This case presents the question whether the Navajo Tribe of Indians is entitled to an injunction preventing the National Labor Relations Board from holding a representation election in a mining plant located on the Navajo Reservation. Suit seeking that relief was brought in the District Court by the Tribe and one of its members against the Labor Board, its members, and three interested unions. The corporation owning the plant intervened as a party plaintiff. Plaintiffs moved for a preliminary injunction; defendants moved for dismissal of the complaint. The court granted the defendants' motion and denied that of the plaintiffs. This appeal followed.

The District Court's principal findings of fact are as follows:

> "1. Plaintiff-intervenor Texas-Zinc Minerals Corporation operate a uranium concentrate mill at Mexican Hat, Utah within the Navajo reservation and annu-

*Sitting by designation pursuant to Sec. 294(d), Title 28, U. S. Code.

ally ships materials in excess of $5,000,000 in value from the Company's plant to the Atomic Energy Commission's receiving station in Colorado. This Company is party to a twenty-five year lease with plaintiff Navajo Tribe covering the land on which the mill is located, which lease was executed in 1956. About 87 persons, of whom 47 are members of the Navajo Tribe and 40 are non-Indians, are employed at the mill.

"2. On May 12, 1959, the United Steelworkers of America, AFL-CIO filed a petition with the Board under Section 9(c) of the National Labor Relations Act requesting that an election be held to determine whether the Texas-Zinc Minerals Corporation's employees wished to be represented by it for collective bargaining purposes.

"3. At the representation hearing before the Board, the Navajo Tribe intervened specially for the purpose of contesting the Board's jurisdiction in the proceeding. The Company, the Steelworkers, and two other unions which intervened in the case, International Union of Operating Engineers, AFL-CIO and International Hodcarriers, Building and Common Laborers Union of America, participated at the hearing.

"4. On February 11, 1960, the Board issued its Decision and Direction of Election in which it determined that the Board has jurisdiction under the Act to administer its provisions with respect to interstate businesses located on the Navajo reservation, and particularly that the Board had such jurisdiction in the case before it, and directed that a representation election be held as requested by the Steelworkers' petition.

"5. On March 23, 1960, plaintiff instituted the instant suit for the purpose of enjoining the Board

from conducting a representation hearing. The gravamen of the complaint is that the Board lacks jurisdiction to conduct an election because (1) the Navajo Tribe has plenary authority of self-government with respect to the members of its Tribe and as to all activity conducted upon its reservation, except to the extent that the federal government has expressly limited such authority, and that pursuant to its power of self-government the Tribe has enacted resolutions forbidding all unionization activities on its reservation, and (2) the National Labor Relations Act was not intended to apply to commerce with an Indian Tribe or to interstate commerce resulting from business activities located on an Indian reservation, nor did Congress exercise its constitutional power in the National Labor Relations Act to regulate commerce 'with the Indian Tribes.'

"Following the filing of the complaint Texas-Zinc Minerals Corporation filed a motion to intervene as plaintiff, and attached thereto its proposed complaint in which it requested, in its prayer for relief, only that the representation election be enjoined until final judicial determination of the issues raised by the pleadings in the proceeding before this Court."

The District Court also stated the following conclusions of law:

"1. The operations of Texas-Zinc Minerals Corporation's plant located on the Navajo Tribe's reservation, as described in the complaint herein, affect interstate commerce within the meaning of the National Labor Relations Act.

"2. The provisions of the National Labor Relations Act, including *inter alia* the provisions which authorize the Board to conduct representation proceedings, are applicable to the Texas-Zinc Minerals Corporation

plant involved in this case, and the Board is accordingly authorized to entertain the petition described in the complaint herein for a representation election among the employees of such plant.

"3. The complaints of plaintiffs Navajo's Tribe and intervenor Texas-Zinc Minerals Corporation fail to state claims warranting relief."

The quoted findings of fact by the District Court are not substantially questioned by appellants. The conclusions of law, however, are vigorously assailed. Appellants' central contentions are that under the Treaty of June 1, 1868, 15 STAT. 667, between the Navajo Tribe and the United States, the Tribe has broad powers of self government, including the right to exclude outsiders;[1] that the decision of the Tribal Council to prevent union activity on its Reservation was within its authority; and that the National Labor Relations Act should not be construed in a way which would conflict with the Treaty and the Tribe's rights under it.

Forceful as these contentions are, we are constrained to disagree. When the Treaty of 1868 was adopted, tribal

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[1] The Treaty provision mainly relied on by appellants is the following:

"The United States agrees that . . . [the Reservation] . . . shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 STAT. 668.

control of such labor problems as may then have existed on the Tribal Reservation may well have been expected, at least to the exclusion of interference by the several States.[2] Since then, however, Congress has adopted a national labor policy, superseding the local policies of the States and the Indian tribes, in all cases to which the National Labor Relations Act applies. Here, the Act clearly applies to the Texas-Zinc Minerals Corporation, the employer-intervenor, because it is engaged in the production of goods for interstate commerce, and labor disputes in its plant would clearly "affect commerce" within the meaning of the Act.[3] The circumstance that the Corporation's plant is located on the Navajo Reservation cannot remove it or its employees—be they Indians or not—from the coverage of the Act. Compare *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 656 (1890); *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960).[4]

The Tribe says that Congress in the National Labor Relations Act did not rely on, or purport to exercise, its power to regulate commerce "with the Indian Tribes," Constitution, Article I, Section 8, Clause 3, and that hence such commerce remains unregulated by the Act. But it is doubtful that commerce with an Indian tribe is involved

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[2] *Compare* Worcester v. Georgia, 6 Pet. (31 U.S.) 515 (1832); Williams v. Lee, 358 U.S. 217 (1959).

[3] The Tribe contests this, but we think it is plainly mistaken, in view of Finding of Fact No. 1, quoted above, not here disputed. See Sections 9(c), 2(6) and 2(7) of the Act.

[4] The decision in Elk v. Wilkins, 112 U.S. 94 (1884), whatever its present-day significance, certainly does not operate to remove "Indians and their property interests" from the coverage of a general statute. See Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. at 116. The National Labor Relations Act is a general statute. Its jurisdictional provisions, and its definitions of "employer," "employ ," and "commerce" are of broad and comprehensive scope.

in this case at all.[5] The Board regulates labor disputes affecting interstate commerce, and the Act authorizes it to do so without stating any exception which would preclude its acting with respect to a plant located within an Indian reservation, or one employing Indians. Congress need not cite or purport to rely on all its powers, when reliance on a single power is ample to sustain its mandate. Nor is its failure to mention its power over commerce with the Indian tribes any indication that it intended to narrow its action with respect to interstate commerce in the manner suggested by appellants.

We conclude that the Board had jurisdiction to enter its challenged order, directing an election. Questions as to the wisdom of the Board in entering the order are not for the courts to decide, and we express no opinion about them. The judgment of the District Court[6] will be

Affirmed.

[5] *Compare* United States v. Forty-Three Gallons of Whiskey, 3 Otto (93 U.S.) 188 (1876); United States v. Holliday, 3 Wall. (70 U.S.) 407 (1865); *Ex parte* Webb, 225 U.S. 663 (1912).

[6] No party to this appeal contends that the District Court lacked jurisdiction over the litigation. Since the suit was one which challenged the Board's determination as being in excess of the Board's powers, and a justiciable question of statutory construction was raised, jurisdiction clearly existed. See Leedom v. Kyne, 358 U.S. 184 (1958).

APPENDIX B

JUDGMENT BELOW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

Civil 867-60

No. 15,735

THE NAVAJO TRIBE, a Treaty Tribe of Indians, *et al.*, *Appellants*,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

Before: Magruder, Senior United States Circuit Judge for the First Circuit, and Prettyman and Washington, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the court that appellees, except the National Labor Relations Board, recover from appellants their taxable costs on this appeal, and have execution therefor.

PER CIRCUIT JUDGE WASHINGTON.

Dated: Mar. 2, 1961.

APPENDIX C

CONSTITUTIONAL PROVISION, TREATY, AND STATUTE INVOLVED

1. The Constitution of the United States provides in Art. I, Sec. 8, Cl. 3, as follows:

> "The Congress shall have Power * * *
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *"

2. Article II of the Treaty of 1868 between the United States and the Navajo Indian Tribe (15 Stat. 667, 668), provides in pertinent part that:

> "* * * the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

3. The relevant provisions of the Labor Management Relations Act, 1947, as amended (29 U.S.C. §§ 151 *et seq.*), are as follows:

> "DEFINITIONS
>
> "SEC. 2. * * *
>
> "(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.
>
> "(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly

owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any

other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"REPRESENTATIVES AND ELECTIONS

* * * * *

"SEC. 9. (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

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the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufactur-

ing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * *

"SEC. 14.

* * * * *

(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.